

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF KINGS)

GERALDINE POLSKY, having first been duly sworn, deposes and says that she is employed by the Office of the United States Attorney for the Eastern District of New York and is over 21 years of age and that on the 7th day of February 1977, she served two copies of the annexed Brief And Addendum For Appellee on

Joseph W. DiSilvestro
Appellant Pro Se
41-11 12th Street
Long Island City, New York 11101

by depositing the same, securely wrapped in a postage prepaid envelope addressed as aforesaid, in a receptacle maintained for that purpose by the United States Postal Service in the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York 11201.

Geraldine Polsky

Sworn to before me this
7th day of February, 1977

Edward S. Rudofsky
EDWARD S. RUDOFSKY
Notary Public, State of New York
No. 52-4523485
Qualified in Suffolk County
Commission Expires March 30, 1978

EXHIBIT

77-6004

Docket No. 776004

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

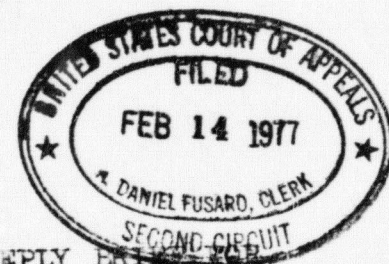
-----X
JOSEPH W. DI SILVESTRO,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.
-----X



REPLY EXHIBIT
APPELLANT

The appellee's brief fails to adhere to the non-enforcement of law relating to veterans and therefore appellee's brief is frivolous.

The action brought in the district court was instituted because to-date, the Veterans Administration sustains an illegal forfeiture of appellants created rights to ~~enjoy~~ entitlements under law pertaining to veterans, which the V.A., refuses to set aside and vacate.

The issue before this Honorable Court is to invalidate sections 211(a) and 705 U.S.C. 38, because appellant was in all prior actions denied of his constitution^{al} right to seek redress of his grievances pursuant to the relevant parts of the First Amendment of the Constitution of the UNITED STATES. See World War Veterans Act 1924, Title VI, sec. 605. 1 /

1/ One commentator has suggested the fact that the VA's investigation coincided with the termination of protracted and bitter litigation, "... creates at least the suspicion that DiSilvestro was a selected victim of a 'low-visibility' system of general non-enforcement of the law." Davis, Veterans' benefits, Judicial Review and Constitutional Problems of "Positive" Government, 39 Ind. L.J. 183, -193-194 (1964).

The records of claim folder # C 4 780 118 DiSilvestro in custody of the VA discloses appellant's entitlements were retroactively forfeited, arbitrarily and capriciously invoked under sec. 15, Title I, Pub. 2, 73rd Congress, under which the VA imposed a cruel penalty, in violation, inter alia, the EIGHT AMENDMENT of the Constitution of the United States.

Under the undisputed facts in the district court the VA (R. 1)(App. 5), holds "The forfeiture was made pursuant 38 U.S.C. sec. 715. ... presently 38 U.S.C. 3503(a)

Here again under a system of general non-enforcement, in violation of statutory authority under the provisions of criminal statute 38 U.S.C. 3503(a), which holds, to wit:

" . . . no forfeiture of benefits may be imposed under this section . . . upon any individual who was a resident at the time of the act or domiciled in a state at the time the act or acts occurred on account which benefits would but for this subsection, be forfeited unless such individual ceases to be a resident of or domiciled in, a state before the expiration of the period during which criminal prosecution could be instituted." 38 U.S.C. sec. 3503(d) (1964)

Further, to show non-enforcement of law relating to veterans, the VA in violation of statutory authority and in excess of authority, administered without PRESIDENTIAL approval sections 211(a) and 715 U.S.C. 38 that required under sec. 7, 8 and 20 Title I, Pub. 2, 73rd Congress, Congressional and Presidential approval (The President's Regulation)(sections 211(a) and 705 U. S. C 38 are in pari materia with section 5, Title I, Pub. 2, 73rd Congress and section 715 is in pari materia with sec. 3503(a) U.S.C. 38). See sec. 426 U.S.C. 38 which is also under direct control of the President; sections 7, 8 and 20 Pub. 2, supra. NO decision of the VA is final and conclusive under 705 and 211 (a) with respect to laws relating to veterans. See World War Veterans Act, Title VI, sec. 605. In support herof to ^{WIT}

The appellant has an already adjudicated war service-
connected disability under an award of benefits that were
illegally forfeited retroactively by the VA.

"Under any act administered by the Veterans
Administration . . . did not preclude
judicial review by the Administrator
working a forfeiture of an already adjud-
icated award of benefits." Wellman v.
Whittier, C.A.D.C., 1958, 259 F. 123 .

Here the appeals court/that the provisions of 11(a)
and 705 were in-applicable; 11(a) is in pari materia
with 211(a) U.S.C. 38, and, 705 is in pari materia with
sec. 5, Pub. 2, 73rd Congress; also see Longernecker
v. Hisley, 1955, 97 U.S.D.C. 144, 229 F. 2d 27 and see
Jaffee, The Right to Judicial Review II, 71 Harv. L.
Rev. 770 (1958)(1958). Further, to wit:

"The determination of fraud upon which the (V A)
... acts retroactively in case of fraud . . .
is not conclusive... Facts found by the Administrator
does not carry with it the conclusiveness of taking
it away retroactively ." Hines v. United States,
ex rel Marsh, 1939, 105 F. 2d App D. C., see World
War Veterans Act 1924, sections 426, 555, which
corresponds with . . . Section section 15, Pub. 2,
73rd Congress. (in pari materia with sections 715,
and 3503(a) U.S.C. 38 .) Parenthesis and underscoring
added by appellant.

In conclusion, appellant's/created rights to compensation under
the provisions of sections 1(a)(b) and 6 of Title 1, Pub. 2,
73rd Congress were RETROACTIVELY FORFEITED by the VA under
an unauthorized application of criminal statute. This subject
matter was was
precluded from judicial review through no fault
of the appellant by the courts in prior actions, and inasmuch
as the appellant exhausted his administrative remedy to-date,

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IS NOT

2/ For further emphasis, 'under no act' relating to
law for veterans, ~~the~~ the VA/authorized 'to administer', a
a forfeiture to a claim for benefits and payments that has
already been adjudicated--this excludes 211(a) but the
validity of the no-review clauses of sections 705 and 211(a)
should be invalidated because the no-review clauses aggrieved
appellant to which he was entitled to judicial review which
has not be accorded the appellant in violation of his right
under the First ~~Amendment~~ AMENDMENT.

and the VA to-date sustains the illegal forfeiture against the appellant this would ~~leave~~ ^{leave} appellant without any legal remedy. The doctrine of res judicata should not apply ~~taxation~~ to bar this action and the Supreme Court held, :-

The VA " may not deny a right the statute created" 38 U.S.C. 728, Dismuke v. United States, 297 U.S. 167, 172, 56 S. Ct. 400, 80 L. Ed. 561

The imposition of the penalty imposed by the VA is cruel under the criminal statute invoked against the appellant and is subject to judicial review for the VA ~~had~~ had pre-knowledge of the existence of appellant's severe service-connected disability. The VA forfeited appellant's rights to further neuropsychiatric treatments. The discontinuance of such medical treatments by the VA cannot be expunged from the mind of the appellant and such cruelty has become chronic.

The district court should be directed to concern itself with the action by the VA working a retroactive forfeiture of an already adjudicated award to benefits that now has been rated by the VA since 1950, ~~taxation~~ 100% disability, war service-connected, and that the district court grant the relief sought for by the appellant in his amended complaint (R. 4).

For the reasons stated above the district court should be reversed and the case remanded with the express views of this Honorable Court and for any and other further relief deemed necessary in the ¹ exigencies in the premises. SEE PAGE NUMBERED 5 ATTACHED HERETO AND MADE A PART OF THIS BRIEF

Respectfully submitted

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Dated Feb. 14, 1977

Appellant has repeatedly stated in this brief, the failure for the VA to perform to-date the Presidential Regulations authorized by statute that accorded the appellant compensation. The VA sustains the obliteration of these rights ^{AGAINST APPELLANT} without statutory authority to the present day. In support hereof it has been held:

"Regulations prescribed by the Administrator of Veterans' Affairs (VA) which are authorized by statute have the force and effect of law."

Brown v. United States, 102 F. Supp. 132
It is to be noted with emphasis, that the VA submitted-
(S.D. 799 aff. Fed 2d 263)

in its Reply Affidavit-

It is to be noted with emphasis, in the relevant part, the non-performance to-date by the VA TO EXCLUDE
FORFEITURE UNDER
appellant from the provisions of criminal statute sec.
3503 U.S.C. 38 wherein the VA prejudiced the district court in its decision for judicial review, that is :

" . . . it was established by the Veterans Administration that the statement in the plaintiff's medical records pertaining to his alleged psychological disability were falsified . . . pursuant to 38 U.S.C. 3503 . . . plaintiff forfeited his rights to benefits." (R.6p. 3, paragraph 6 VA's Reply Affidavit)

Congress protected appellant's constitutional rights and the VA violated them, to wit:

Sec. 3503(a):

Whoever knowingly makes or causes to be made or conspires, combines, aids, or assists, agree to, arrange for, or in any way procures the making, or presentation of a false or fraudulent affidavit, ~~xxxxxxx~~ ~~xxxxxxx~~ declaration, certificate, statement, voucher or paper, concerning any claim for benefits under any of the laws administered by the Veterans' Administration . . . shall forfeit all rights, claims, and benefits under all laws administered by the Veterans' Administration.."
Then in 1959, Congress added subsection (d) (which precluded the appellant from forfeiture action, which to-date the VA sustains against the appellant) subsection (d)

. . . no forfeiture of benefits may be imposed under this section: . . . upon any individual who was a resident of, or domiciled in, a State at the time the act or acts occurred on account of which benefits would, but for this subsection, be forfeited unless such individual ceases to be a resident of, or domiciled in, a State ~~before~~ before the expiration of the period in which criminal prosecution could be instituted. 38 U.S.C. sec. 3503(d) (1964)

Respectfully submitted,

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Atty pro se.

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9/2
Docket No. 77-6004

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH W. DI SILVESTRO,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT

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mailed this date, a copy of
the within to U.S. Attorney for
E.D.N.Y. - 2-14-77

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Page 5 herein, - a copy mailed this day 2-17-77 to
U.S. atty for E.D.N.Y.

Joseph W. Di Silvestro